

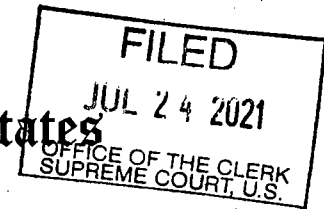
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ORIGINAL

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IN THE  
**Supreme Court of the United States**

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LIN OUYANG,

*Petitioner,*

v.

ACHEM INDUSTRY AMERICA, INC.

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT  
OF APPEAL FOR THE SECOND DISTRICT

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**PETITION FOR WRIT OF CERTIORARI**

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Dated: July 24, 2021

## QUESTION PRESENTED

A three-judge panel of California Court of Appeal, in an extraordinary writ proceeding reviewing an interlocutory trial court order denying motion for summary adjudication, proposed undisputed material facts on issues that were not decided by the trial court, reviewed their own evidence without giving the parties an opportunity to produce their evidence and reversed trial court's order denying motion for summary adjudication.

Except one justice who retired, the rest two justices remained in the panel deciding the subsequent appeal of the final judgment, in which contentions were raised that California Court of Appeal erred in reversing trial court's order denying motion for summary adjudication on issues that were not decided by the trial court and evidence that contradicts the evidence of California Court of Appeal was denied an opportunity to submit by the Court of Appeal. The appeal also involves claims that are related to the issues decided by the Court of Appeal in the extraordinary writ proceeding.

The question presented is:

1. Did the California Court of Appeal justices' failure to recuse themselves from deciding the appeal of the final judgment violate the Due Process Clause?

## PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Achem Industry America, Inc. is a wholly owned subsidiary of Achem Technology Corporation. Achem Technology Corporation 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Achem Technology Corporation. Yem Chio Corporation Ltd. holds controlling shares of Achem Technology Corporation's stock. Yem Chio Corporation Ltd. 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Yem Chio Corporation Ltd.

## RELATED PROCEEDINGS

*Lin Ouyang v. Achem Industry America, Inc.*, California Court of Appeal, No. B290915. Opinion entered 12/3/2020,

*Achem Industry America, Inc. v. Los Angeles Superior Court*, California Court of Appeal, No. B282801. Order and Opinion reversing Los Angeles Superior Court's order denying motion for summary adjudication entered 8/16/2017.

*Lin Ouyang v. Achem Industry America, Inc.*, Los Angeles Superior Court, No. BC556293. Order denying motion for summary adjudication entered 5/15/2017.

*Lin Ouyang v. Achem Industry America, Inc.*, Los Angeles Superior Court, No. BC556293. Judgment entered 6/19/2018.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Lin Ouyang respectfully requests this Court grant her petition for writ of certiorari and vacate California Court of Appeal 's decision involving unusual circumstances that required the recusal of the state appellate court justices.

Petitioner has not been able to find a case where an appellate court judge sitting as an appellate court judge adjudicated the matter that is supposed to be adjudicated by a trial judge and later the appellate court judge had to review her own order from appeal of the final judgment. The absence of direct authority on this point is precisely because no one would consider such a thing permissible: "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citation omitted). As this Court has noted, "[t]he easiest cases don't even arise." *Id.* (citation and internal quotations omitted). This is one of those easy cases: an appellate court judge cannot maintain a constitutional level of impartiality in reviewing a judgment that she involves as a trial judge.

Petitioner requests that this Court grant her petition for writ of certiorari to correct this fundamental miscarriage of justice.



## OPINIONS BELOW

On May 15, 2017, Los Angeles Superior Court denied Respondent Achem Industry America Inc.'s motion for summary adjudication. Los Angeles Superior Court No. BC556293. Order. App. 55a-57a.

On August 16, 2017, California Court of Appeal, before trial court reached a final judgment, reversed trial court's order denying motion for summary adjudication via an extraordinary writ proceeding and directed trial court to enter an order granting the motion. Justice Nora M. Manella authored the opinion, and Justice Audrey B. Collins and former Justice Norman L. Epstein concurred. *Achem v. Los Angeles Superior Court*, California Court of Appeal, No. B282801, unpublished, App. 27a-52a.

On June 19, 2018, Los Angeles Superior Court entered a final judgment, Los Angeles Superior Court No. BC556293. Order. App. 58a-59a.

On July 22, 2019, California Court of Appeal denied Petitioner Ouyang's request to disqualify Justice Nora M. Manella and Justice Audrey B. Collins from hearing the underlying appeal. Ouyang's request was made in a complaint filed with the Administrative Presiding Justice of California Court of Appeal, Second District. No order was made.

On December 3, 2020, California Court of Appeal affirmed trial court's final judgment entirely. Justice Nora M. Manella authored the opinion, and Justice Audrey B. Collins and Justice Brian S. Currey

concurrent. *Ouyang v. Achem*, California Court of Appeal, No. B290915, unpublished, App. 1a-26a.

On December 29, 2020, California Court of Appeal denied petition for rehearing. Order. App. 53a.

On February 24, 2021, California Supreme Court denied petition for review. Order. App. 54a.

### **JURISDICTION**

The judgment of the California Court of Appeal was entered on December 3, 2020. App. 1a. California Supreme Court denied petition for review on February 24, 2021. App. 54a. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Orders of March 19, 2020, and July 19, 2021, extending the time to file due to the Covid emergency. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL PROVISION INVOLVED**

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. The Underlying Action

Petitioner Lin Ouyang (“Ouyang”) filed a civil action against Respondent, her former employer Achem Industry America, Inc. (“Achem”) App. 28a. Ouyang’s complaint (“the complaint”) contains a fraud cause of action and a breach of contract cause of action alleging that Achem made false representations to Ouyang that Achem would pay Ouyang’s health insurance premium while she was on unpaid leave and the complaint seeks damages for uninsured medical expense. App. 36a-38a.<sup>1</sup>

The complaint also contains a wrongful constructive termination cause of action and discrimination cause of action. App. 4a. Trial court sustained demurred to those causes on the ground of statute of limitations. App. 6a-7a.

Achem, in its verified answer, admits among other matters that Achem agreed to pay Ouyang’s health insurance premium while she was on unpaid leave, as Ouyang “was expected to return back to work at Achem”, however Achem denies authority over its group health insurance plan and Achem further alleges that Achem lacks knowledge or information about whether Ouyang was enrolled in its group health insurance plan and

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<sup>1</sup> The opinion also summarized the claims as “Achem improperly allowed her employment-based health insurance coverage to lapse when she took a leave of absence from her employment.” App. 28a. Also see App. 38a. (“The fraud claim relies on allegations that Achem knowingly made false representations to Ouyang regarding the payment of her insurance premiums and her ineligibility for COBRA coverage”.)

whether Ouyang was terminated from its group health insurance plan.

California Court of Appeal, No. B290915, 4 CT 933-936.<sup>2</sup>

## **II. Motion for Summary Adjudication Proceedings in Los Angeles Superior Court**

Achem filed in trial court a motion for summary adjudication of issues alleging that the fraud and the breach of contract claims “were subject to ERISA preemption”. App. 39a. Achem did not establish that Achem’s group health insurance plan was an employee welfare benefit plan within the meaning of ERISA, rather Achem contended that Achem’s group health insurance plan did not provide health insurance to employees who did not work full time and Ouyang was aware of that. App. 40a. Achem also argued that “ADP-- rather than Achem -- was responsible for the misrepresentations that Ouyang attributed to Achem ... [O]nly ADP ... made the misrepresentation[s] to [Ouyang regarding] her health insurance eligibility. . . [Achem] did not make any”. App. 39a-40a.

Ouyang opposed the motion on the ground that Achem failed to carry its burden of showing that Achem’s group health insurance plan constituted an ERISA plan. App. 40a-41a. Ouyang further argued that Achem’s agreement to pay her health insurance premium while she was on unpaid leave is an individual agreement outside the scope of ERISA. App. 40a-41a.

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<sup>2</sup> California Court of Appeal’s opinion omitted statements made by Achem in its verified answer that were considered by trial court in ruling motion for summary adjudication. App. 28a-51a, 56a-57a, California Court of Appeal, No. B290915, 13 CT 2952-2953, 2964-2965, 2975-2984.

Trial court denied Achem's motion finding that triable issues of material facts existed including but not limited to whether Ouyang's claim related to an ERISA plan, at the same time trial court found that Ouyang did not plead an ERISA claim. App. 42a, 55a-57a. Trial court's order further stated that "[Ouyang's] evidence, if credited by the trier of fact, is sufficient to establish that any agreement by [Achem] to provide health benefits to [Ouyang] when she was on unpaid leave<sup>3</sup> was outside of [Achem's] agreement to provide coverage for her while she was working." App. 42a, 57a.

Trial court did not adjudicate whether triable issue exists as to existence of an employee welfare benefit plan within the meaning of ERISA. App. 42a, 56a-57a.

### **III. Extraordinary Writ Proceedings in California Court of Appeal**

California Court of Appeal granted Achem's petition for an extraordinary writ to review trial court's denial of Achem's motion for adjudication before trial court entered a final judgment. App. 28a.

A. California Court of Appeal Decided an Issue of Fact that  
Was Not Adjudicated by the Trial Court and Did Not Give  
the Parties a Notice to Produce Their Evidence on the Issue.

California Court of Appeal proposed undisputed facts on the issue of existence of an ERISA plan that was not adjudicated by the trial court, and

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<sup>3</sup> California Court of Appeal's opinion omitted statement "when she was on unpaid leave", a part of trial court's order. App. 57a.

California Court of Appeal asserted that Ouyang's complaint supported its position without giving the parties an opportunity to produce their evidence. App. 42a-45a, 55a-58a.

Achem, in its verified answer, affirmatively denies that it has authority over its group health insurance plan and Achem further alleges that Achem lacks knowledge or information about whether Ouyang was enrolled in its group health insurance plan or whether Ouyang was terminated from its group health insurance plan. California Court of Appeal, No. B290915, 4 CT 933-936. Even though, Ouyang alleges in the complaint upon information and belief that Achem has authority over its group health insurance plan App. 38a<sup>4</sup>, statements of Achem's denial of authority with specific facts in its verified answer shows genuine dispute as to whether an ERISA plan exists. App. 43a. ("[retaining] authority to terminate the policy or change its terms" is required to establish or maintain an ERISA plan), California Court of Appeal, No. B290915, 4 CT 933-936.

Because no parties raised the issue that Achem has authority over its group health insurance plan and no parties submitted evidence on that issue, App. 39a-42a, California Court of Appeal reviewed its own evidence and found that evidence was not in dispute that Achem had authority over its

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<sup>4</sup> The allegation that Achem has authority over its group health insurance plan was made upon information and belief in the complaint. California Court of Appeal, No. B290915, 4 CT 752:24-25. California Court of Appeal's opinion omitted statement of upon information and belief. App. 38a.

group health insurance plan and no triable issue existed as to existence of an ERISA Plan. App. 43a-45a.

B. California Court of Appeal Raised a New Argument that Is Opposite to Both Parties' Allegations and Did Not Give the Parties a Notice to Respond.

California Court of Appeal also raised the argument that Ouyang's allegation that Achem's agreement to pay her health insurance premium on unpaid leave is not part of Achem's group health insurance plan is a new theory of liability not pleaded in the SAC and is inconsistent with the SAC's allegations. App. 46a-47a.

To support its position, California Court of Appeal asserts that "Nothing in the SAC reasonably suggests that Achem agreed to pay for Ouyang's HMO health insurance pursuant to an individual contract separate from Achem's ERISA plan." App. 47a. Contrary to Court of Appeal's allegation, the complaint specifically pleads that when Ouyang enrolled in Achem's health insurance plan, she checked whether Achem would continue to pay her health insurance premium while she was on unpaid leave and stated that she would enroll in COBRA if Achem no longer made that offer. California Court of Appeal, No. B290915, 4 CT 751:9-12.

California Court of Appeal also asserts that a one-page letter attached to the complaint "described the terms of Achem's group health

insurance plan, including the availability of HMO health insurance coverage at no cost to employees”, App. 41a, however the complaint does not make a statement or indication that the letter described the terms of Achem’s group health insurance plan. California Court of Appeal, No. B290915, 4 CT 778. Moreover, the complaint states that Achem’s representations in the letter is false, California Court of Appeal, No. B290915 4 CT 752:4-8, and Achem in its verified answer denies making the representations in the letter and denies sending the letter. California Court of Appeal, No. B290915, 4 CT 935:17-23.

Because California Court of Appeal did not notify the parties of its allegations, Ouyang was not able to respond that the court’s allegations were based on misrepresentations of the record and were opposite to both parties’ allegations. App. 39a-40a (Achem contended that Achem’s group health insurance plan did not provide health insurance to employees who did not work full time and Ouyang was aware of that), App. 42a (trial court did not find that Ouyang pleaded an ERISA claim), App. 38a (“The fraud claim relies on allegations that Achem knowingly made false representations to Ouyang regarding the payment of her insurance premiums and her ineligibility for COBRA coverage”).

In sum, California Court of Appeal proposed undisputed material facts, reviewed its own evidence, found the facts were not disputed without



giving the parties an opportunity to provide their evidence, and reversed trial court's summary adjudication denial.

California Court of Appeal denied Ouyang 's timely petition for rehearing. California Supreme Court denied Ouyang's timely petition for review. App. 25a.

Trial court reversed its order denying Achem's motion for summary adjudication pursuant to California Court of Appeal's order and entered a final judgment subsequently. App. 2a.

#### **IV. Request to disqualify Justice Manella and Justice Collins**

On July 20, 2019, Ouyang requested to disqualify Justice Manella and Justice Collins from hearing the underlying appeal in her complaint filed with Administrative Presiding Justice of California Court of Appeal – Second Appellate District.

Ouyang claimed that she could not have a fair hearing before the justices. Ouyang 's request was made on the ground that the justices did not provide her a due process hearing in her prior appeals California Court of Appeal Nos. B261929 and B267217, in which the justices decided the appeals basing on arguments raised by themselves and basing on significantly misstated trial court record.

Ouyang's request of disqualification was denied. As a result, except Justice Epstein who retired, all justices, Justice Manella and Justice Collins,

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who participated in the extraordinary writ proceeding remained in the panel to decide the underlying appeal.

**V. Appeal Proceedings in California Court of Appeal**

**A. On appeal, California Court of Appeal Refused to Correct the Errors Made in the Extraordinary Writ Proceeding.**

On appeal, Ouyang requested California Court of Appeal to vacate its order reversing trial court's order of denying motion for summary adjudications on the ground of due process violations. Ouyang also requested California Court of Appeal to consider the evidence that contradicts California Court of Appeal's evidence creating triable issue of material facts on the matter of ERISA preemption. California Court of Appeal, No. B290915, Appellant's Opening Brief 52-53. California Court of Appeal denied Ouyang's request, finding its order in the extraordinary writ proceeding final. App. 24a-25a.

**B. Relevant Claims Were Also Erroneously Determined as a Result of California Court of Appeal's Failure to Correct the Errors Made in the Extraordinary Writ Proceeding.**

On appeal, Ouyang raised the argument that trial court erred in sustaining demurrer to the discrimination causes of action and the wrongful constructive termination cause of action because Achem is estopped from claiming statute of limitation defense by its false representations and the delay was caused by Ouyang's reasonable reliance on those false

representations. Achem's false representations include that Achem failed to pay Ouyang the promised wage not because of discrimination, but because Achem's new management was confused by the fraud committed by the prior management who placed Ouyang on pay roll as a purchasing clerk while Ouyang performed the job duties of a computer information system manager and that Achem needed to investigate Ouyang's job duties to decide whether to increase Ouyang's wage. California Court of Appeal, No. B290915, Appellant's Opening Brief 40-48.

California Court of Appeal found that Ouyang could not assert that Achem was estopped from asserting the statute of limitations defense because "Achem did not act in a manner that could have led Ouyang to believe her claims would be amicably resolved", App. 17a.

Contrary to California Court of Appeal's assertion, the complaint alleges in the fraud cause of action and breach of contraction cause of action that Achem promised to pay Ouyang health insurance premium on her unpaid leave, and that offer together with Achem's representations to investigate Ouyang's job duties is an act to resolve the claim amicably, as Achem's group health insurance plan does not provide payment of health insurance premium to employees on unpaid leave. California Court of Appeal, No. B290915, 4 CT 751:9-12.

However, in the extraordinary writ proceeding, California Court of Appeal made a misstatement that a one-page letter from Achem to Ouyang described the terms of Achem's group health insurance plan and found that

Ouyang's allegation of entitlement to payment of health insurance premium on unpaid leave was based on Achem's group health insurance plan. App. 41a, App. 46a-47a, California Court of Appeal, No. B290915, 4 CT 778.

California Court of Appeal will have to confess previous error of misstatement if it considers the allegations in the complaint that Achem made a special agreement to pay Ouyang health insurance premium on her unpaid leave. Because California Court of Appeal refused to correct its error, California Court of Appeal also erroneously decided the discrimination and wrongful constructive termination claims on appeal finding "Achem did not act in a manner that could have led Ouyang to believe her claims would be amicably resolved", App. 17a, 24a-25a, 46a-47a.

#### **VI. Petition for Rehearing in California Court of Appeal**

Ouyang raised the issue that she was denied a fair tribunal and renewed her request of disqualification in her petition for rehearing. California Court of Appeal, No. B290915, Petition for Rehearing, pp. 14, 59-60.

Petition for rehearing was denied by California Court of Appeal. App. 53a.

#### **VII. Petition for Review in California Supreme Court**

Ouyang raised the issue that she was denied a fair tribunal in her petition for review.

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Petition for review was denied by California Supreme Court. App.

54a.

#### **REASON FOR GRANTING THE PETITION**

- A. Certiorari Review is Warranted Due to the California Appellate Court's Departure from the Accepted and Usual Course of Judicial Proceedings that Created an Unacceptable Risk of Judicial Bias.

This Court will review a state court decision when a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. SCR 10 (c). "An important federal question" means that the issue involved reaches constitutional dimensions. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 US 70, 74. For example, this Court granted certiorari to decide the important federal constitutional questions raised in proceedings wherein witness before a Michigan "judge-grand jury" were adjudicated in contempt by same judge who had sat as grand jury. *In re Murchison*, 349 US 133, 136.

Here, justices of California Court of Appeal affirmed a summary judgment grant on appeal while the grant was entered by trial court under the direction of the same justices' reversal of the trial court's summary judgment denial and the reversal was based on issues of facts not

adjudicated by the trial court, but by the same justices in the interlocutory review of a summary judgment denial without giving the parties a notice and an opportunity to submit their evidence. The California Court of Appeal justices' failure to recuse themselves conflicts with this Court's due process precedents. Even though, an appellate court may review a summary judgment denial before entry of a final judgment under certain circumstances, Cal. Code Civ. Proc. § 437c(m); *Brown, Winfield & Canzoneri, Inc. v. Superior Court*, 47 Cal.4th 1233, 1238; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019, the scope of review should be limited to the issues decided by the trial court because appellate jurisdiction is limited to revise and correct decisions of a superior court. *Marbury v. Madison*, 5 US 137, 175 ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.") The appellate court in this case crossed such limitation, it decided in an extraordinary writ proceeding matter of facts that were not adjudicated by the trial court and the court later reviewed its own ruling on appeal of the final judgment. The ruling of California Court of Appeal so far had departed from the accepted and usual course of judicial proceedings as to warrant this Court's plenary consideration. SCR 10.

B. Justice Manella and Justice Collins' Failure to Recuse  
Themselves Conflicts with this Court's Due process  
Precedents.

Justice Manella and Justice Collins' failure to recuse themselves from this case violated Ouyang's Due Process right. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 US 238, 242. This Court has explained that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 US 133, 136. In this case, Justice Manella and Justice Collins had been a judge of their own case in both the extraordinary writ proceeding and the appeal proceeding.

In the extraordinary writ proceeding, Justice Manella and Justice Collins was a moving party when they proposed undisputed facts and identified portions of pleadings to support their position and at the same time, they were a judge when they reviewed evidence and found their proposed undisputed facts were undisputed. *Aguilar v. Atlantic Richfield Co.*, 24 P. 3d 493, 107 Cal.Rptr.2d 841, 861("generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact"); *Celotex Corp. v. Catrett*, 477 US 317, 323 ("a party seeking summary judgment always bears the initial responsibility of informing the

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district court of the basis for its motion, and identifying those portions of

"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.") Like the "judge-grand jury" in *Murchison*, Justice Manella and Justice Collins cannot remain impartial in such a proceeding wherein they served as both an adjudicator and a party being adjudicated, thus their recusal is constitutionally required. *In re Murchison*, 349 U. S. 133, 136-137. (A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case.)

In the appeal proceeding, Justice Manella and Justice Collins was a trial judge when they adjudicated whether genuine issue of material facts existed as to existence of an ERISA plan that was not adjudicated by the trial court and was an appellate court judge when they reviewed their order from the final judgment whether they erred in finding that no genuine issue of material facts existed. Congress barred judges from hearing on appeal cases that they had decided at trial. 28 U.S.C. § 47. *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 33 S.Ct. 515, 57 L.Ed. 864 (1913). Apparently, the U.S. Congress enacted that statute based on due process concerns involved when a judge would review criticism of his own decision at the trial level. Yet, in California there are no such prohibitions by statute - even there should be, as a matter of federal constitutional due process of law. This Court has held that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant,



personal involvement as a prosecutor in a critical decision regarding the defendant's case. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905.

Here, the due process violation is even clearer than that in *Williams*. While *Williams* judge was a party in the trial court as a prosecutor, *Ibid.*, Justice Manella and Justice Collins were both a party and a trial judge when they adjudicated whether genuine issue of material facts existed as to authority over an ERISA plan, an issue of fact proposed as undisputed by the judges themselves and supported by evidence identified also by the judges. In other words, the judges in this case were a party, trial judge, and appellate court judge all in one, or we may call it "one-man courts". Applying the objective standard and the due process maxim that "no man can be a judge in his own case" to these circumstances, the likelihood of the presence of partiality is sufficiently great to support a rule of absolute disqualification. *In re Murchison*, 349 US 133, 136.

This Court should grant certiorari review and vacate California Court of Appeal's decision, which violates Ouyang's Fourteenth Amendment right.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Dated July 24, 2021.

Respectively submitted,

  
LIN OUYANG

Petitioner *in pro se*